INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and other authorities involved	2
Statement	2
Argument	3
Conclusion	6
Appendix	7

CITATIONS

CASES:

Commissioner v. *Stringham*, 183 F. 2d 579	4
Dobkin v. *Commissioner*, 15 T. C. 886	5
Havey v. *Commissioner*, 12 T. C. 409	5
Keller v. *Commissioner*, decided August 1, 1949	5
Seymour v. *Commissioner*, 14 T. C. 1111	5
Wendell v. *Commissioner*, 12 T. C. 161	5

STATUTE:

Internal Revenue Code:	
Sec. 23 (26 U.S.C. 1946 ed., Sec. 23)	3, 4, 7
Sec. 24 (26 U.S.C. 1946 ed., Sec 24)	3, 7

MISCELLANEOUS:

S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 95-96 (1942-2 Cum. Bull. 504, 576-577)	4, 9
Treasury Regulations 111, Sec. 29.23(x)-1	4, 8

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 158

SAMUEL OCHS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 2-9) is reported at 17 T.C. 130. The opinion of the Court of Appeals (R. 11-22) is reported at 195 F. 2d 692.

JURISDICTION

The judgment of the Court of Appeals was entered March 27, 1952. (R. 23.) The petition for a writ of certiorari was filed June 24, 1952. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether the taxpayer is entitled to deduct as medical expenses under Section 23 (x) of the Internal Revenue Code sums which he spent in the taxable year in maintaining his two minor children in day schools and boarding schools while his wife was recuperating from a serious illness.

STATUTE AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of the statute and other authorities involved are set forth in the Appendix, *infra*, pp. 7-11.

STATEMENT

The facts as found by the Tax Court (R. 4-5) are substantially as follows:

In 1943 the taxpayer's wife was operated on for cancer of the throat. She had not entirely recovered by 1946. (R. 4.) In the latter year a reputable physician advised the taxpayer that his wife's health would not improve and that the cancer might recur unless she was separated from their two young children (R. 4). Accordingly, during the tax year in question (1946) the petitioner maintained his two children in day and boarding schools, at a cost of $1456.50. The taxpayer's purpose in sending the children to boarding school during 1946 was to alleviate the pain and suffering caused his wife by caring for the children and to prevent a recurrence of the cancer. (R. 4, 5.) Petitioner's wife had part-time employ-

ment in 1946 as a typist and stenographer (R. 5).

The taxpayer deducted the $1456.50 from his income for the year 1946 as a medical expense under Section 23(x) of the Internal Revenue Code (R. 4). The Commissioner disallowed the deduction and determined a deficiency in his income tax (R. 3).

The Tax Court held that the expenses in question were not deductible as "medical expenses" under the provisions of Section 23(x) of the Code (R. 9, 10), and the Court of Appeals affirmed the Tax Court's decision (R. 23).

ARGUMENT

The court below correctly held that the amounts spent by the taxpayer during the taxable year for maintenance of his two minor children at day and boarding schools cannot be deducted as medical expenses. Having been spent for the schooling of two healthy children, the amounts involved were clearly family expenses, the deduction of which is specifically prohibited by Section 24 (a)(1) of the Internal Revenue Code (Appendix, *infra*).

An expenditure, to be deductible as a medical expense, must actually be incurred for medical care, which is defined by Section 23 (x) of the Internal Revenue Code (Appendix, *infra*) as including—

> amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or

> for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance).

The language of Section 23 (x) clearly confines the privilege of the deduction to expenditures customarily considered as being for medical treatment. That such was the intention of Congress is further shown by S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 95-96 (1942-2 Cum. Bull. 504, 576-577) (Appendix, *infra*), which indicates that the deduction is to be limited to expenses incurred *primarily* for the prevention or alleviation of a physical or mental illness or defect. See also Section 29.23(x)-1 of Treasury Regulations 111 (Appendix, *infra*).

There is no conflict in the decisions. *Commissioner* v. *Stringham*, 183 F. 2d 579 (C.A. 6), on which taxpayer relies, involved the traveling and maintenance expenses of a small girl who was suffering from asthma and the effects of pneumonia and was sent to Arizona to recover from her illness. Such expenses were correctly held to be deductible as medical expenses. Obviously, the facts here are distinguishable. Moreover, the Court in the *Stringham* case denied the right to deduct the cost of the child's schooling as not being necessary to her recovery.

In interpreting Section 23 (x), the Tax Court has uniformly held that the one who seeks the deduction must show a direct or proximate relation

between the expense and the treatment or prevention of disease and cannot be granted the privilege merely because the expense may be incurred for something beneficial to health such as a vacation. See *Dobkin* v. *Commissioner,* 15 T. C. 886; *Seymour* v. *Commissioner,* 14 T. C. 1111; *Havey* v. *Commissioner,* 12 T. C. 409; *Wendell* v. *Commissioner,* 12 T. C. 161; and *Keller* v. *Commissioner,* decided August 1, 1949 (1949 P-H T. C. Memorandum Decisions, par. 49,185).

In accord with these decisions, the Tax Court held here that the amounts spent were not for medical care within the meaning of Section 23 (x). As taxpayer asserts, the Tax Court did find that the taxpayer's children were sent to school to alleviate his wife's suffering and to prevent a recurrence of the cancer but the amounts involved were spent on the children, who were not ill. Moreover, the Tax Court also found that the schooling was beneficial to the children while the mother was unable to care for them and that she secured part-time employment as a typist and stenographer while they were away. (R. 5, 9.) As Judge Hand pointed out in the court below, the school expenses were made necessary by the loss of the wife's services in caring for the children and were no more deductible than expenses which the husband might have incurred in employing a governess to care for them, despite the fact that the wife also was benefited. Judge Hand thought it unlikely that

Congress intended to transform family expenses into medical expenses simply because they benefited the health of a member of the family, and this seems a correct interpretation of the provision.

CONCLUSION

The decision of the court below is correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY 1952.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOM INCOME.

In computing net income there there shall be allowed as deductions:

* * * * * *

(x) [as added by Sec. 127 (a) of (a) of the Revenue Act of 1942, c. 619, 56 Stat. Stat. 798, and amended by Sec. 8 (c) of the Indivi Individual Income Tax Act of 1944, c. 210, 58 St, 58 Stat. 231] *Medical, Dental, Etc., Expenses.*—*ses.*—Expenses paid during the taxable year, not com not compensated for by insurance or otherwise, for se, for medical care of the taxpayer, his spouse, or a se, or a dependent specified in section 25 (b)(3), (b)(3), to the extent that such expenses exceed 5 per ed 5 per centum of the adjusted gross income. * * * T * * * The term "medical care", as used in this sul this subsection, shall include amounts paid for the di r the diagnosis, cure, mitigation, treatment, or preve r prevention of disease, or for the purpose of affect f affecting any structure or function of the body (in body (including amounts paid for accident or healt r health insurance).

* * * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE. LE.

(a) *General Rule.*—In computing nputing net in-

come no deduction shall in any case be allowed in respect of—

(1) [as amended by Sec. 127 (b) of the Revenue Act of 1942, *supra*] Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23 (x);

* * * * *

(26 U.S.C. 1946 ed., Sec. 24.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23(x)-1. *Medical, Dental, Etc., Expenses.*— * * *

* * * * *

The term "medical care" as used in this section and in section 23 (x) includes amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance). * * * Allowable deductions under section 23 (x) will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness. Thus, payments for expenses for hospital, nursing (including nurses' board where paid by the taxpayer), medical, laboratory, surgical, dental and other

diagnostic and healing services, for drugs and medical and dental supplies (including artificial teeth or limbs), and for ambulance hire and travel primarily for and essential to the rendition of the medical services or to the prevention or alleviation of a physical or mental defect or illness, are deductible.

* * * * *

S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 95-96 (1942-2 Cum. Bull. 504, 576-577):

SECTION 127. DEDUCTION FOR MEDICAL, DENTAL, ETC., EXPENSES

This section, inserted into the bill by your committee, adds section 23 (x) to the Code to allow a deduction for expenses paid during the taxable year for medical care of the taxpayer, his spouse, or a dependent of the taxpayer. The deduction is limited to such expenses as exceed 5 percent of the net income computed without the benefit of section 23 (x). Where a husband and wife file a joint return the limitation is 5 percent of the aggregate net income of such husband and wife. The maximum deduction for any taxable year in the case of a husband and wife who file a joint return, or head of a family, may not exceed $2,500, and in the case of all other individuals, $1,250.

The term "medical care" is broadly defined to include amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. It is not intended, however, that a deduction should be allowed for any expense that is not incurred primarily for the prevention or alleviation of a physical or mental defect or illness.

Although a deduction is denied with respect to such expenses as are compensated for by insurance or otherwise, amounts paid for accident or health insurance are included in the category of medical expenses. Payments for hospitalization insurance or for membership in an association furnishing cooperative or so-called free-choice medical service, or group hospitalization and clinical care are intended, for purposes of this section, to be included as amounts which may be deducted.

Section 24 (a), relating to items not deductible, is amended by section 127 to conform to section 23 (x), and a technical amendment is made to section 23 (o) to provide that, in computing net income for purposes of the deduction for charitable and other contributions, the deduction for medical expenses shall not apply. Finally, section 22 (b)(5) is amended to include in gross income amounts received

for compensation for personal injuries or sickness which are attributable to and not in excess of deductions allowed under section 23 (x) in any prior taxable year.

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